Supreme Court, U.S.
FILED
JAN 12 1995
OFFICE OF THE CLERK

No. 94-1013

In The

Supreme Court of the United States

October Term, 1994

OJAVAN INVESTORS, INC., et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

PETITIONERS' REPLY BRIEF

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I

INTRODUCTION

Though the December 5, 1994 Petition presented the question of whether Petitioners were denied due process below, the Commission's Opposition gives this central question a cavalier dismissal (slightly over one page (Opp. 18-19)), *not condescending to cite a single opinion of this Court.*[1] Rather than confront the constitutional issue raised, the Commission offers an Opposition which is for the most part a paraphrase of the California court of

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[1] The entire Opposition focuses on state law; only two cases of this Court are so much as mentioned, one (*Shelley v. Kraemer*, 334 U.S. 1 (1948)) in an effort to distinguish it, the second (*Coleman v. Thompson*, 501 U.S. 722 (1991)) to state the general theory of adequate and independent state grounds.

The Opposition's focus on California law rather than the law of this Court comes as no surprise. As Petitioners pointed out at Pet. pp. 23-26, California has become an insular, self-contained entity in land use regulation law, characterized at all judicial levels by extreme deference to government and antipathy to individual rights in property. The Commission does not dispute this, nor could it: the fact is too widely known and the supporting evidence too strong to make denial credible. Since the Petition was filed, this phenomenon has manifest itself once again. At Pet. p. 26 n.23, Petitioners noted that at the time it decided *Dolan v. City of Tigard*, ___ U.S. ___, 120 L. Ed. 2d 304 (1994), this Court also ordered reconsideration of *Ehrlich v. Culver City*, 15 Cal. App. 4th 1737 (1993), in light of *Dolan*. On December 23, 1994, the California Court of Appeal for the Second Appellate District, Division Five issued its second *Ehrlich* opinion, and it is almost as if *Dolan* never happened: the court reissued its prior opinion with a few modifications to pay lip service to *Dolan*, again sustaining all the exactions Culver City imposed, including one requiring the property owners to spend tens of thousands of dollars to furnish art to the community.

appeal opinion, and (unfortunately but predictably) seeks refuge in state law under the "adequate and independent grounds" rubric. But the Commission's construct fails; the alleged state grounds it asserts are neither "adequate" nor "independent."

II

THE FEDERAL CONSTITUTIONAL RIGHTS ASSERTED BY PETITIONERS CANNOT BE FRUSTRATED BY STATE PROCEDURES

A. States Can Augment Federal Constitutional Rights Afforded Their Residents, But Cannot Diminish Or Deny Those Rights

As Justice Holmes put it in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923), "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Justice Kennedy expressed the same thought in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 824 (1992), when he stated that if the just compensation clause is to be effective, "its enforcement must not be frustrated by a shifting background of state law." This rule is no more than an application of these governing principles:

(1) the Constitution of the United States is the "supreme law of the land" (U.S. Const. art. VI, cl. 2; Cal. Const. art. III, § 1);

(2) while it is permissible for the states to extend greater protections to residents than those required by the United States Constitution (*Cooper v. California*, 386 U.S. 58, 62 (1967); *People v. Brisendine*, 13 Cal. 3d 528,

549 (1975)) it is not permissible to shrink those protections; and

(3) what cannot be done directly because of constitutional proscriptions also cannot be done indirectly (*Macallen v. Massachusetts*, 279 U.S. 620, 629 (1929)).

The Commission attempts an end run around this bedrock law by arguing that this Court has no jurisdiction to consider the Petition because the decisions below are supported by adequate and independent state grounds. Not so.

B. The Doctrine of Adequate And Independent State Grounds Has No Application In This Case

The Commission urges time-bar, waiver and assignment as "adequate and independent state grounds" precluding this Court's intervention. But the *sine qua non* of the doctrine of adequate and independent state grounds is – in the words of the only Supreme Court case the Commission relies on in their entire opposition – that "if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). "A state ground is 'adequate' where the judgment would have to be upheld even if the federal ground were reversed; . . . . A state ground is 'independent' where its resolution is not tied to federal issues in the case." Laurence H. Tribe, *American Constitutional Law*, § 3-24 p. 163 (Foundation Press, 2d ed. 1988). But if this Court were to hold here, on Constitutional grounds, that by an improper application of limitations, waiver and assignment, the courts below denied

Petitioners due process (by preventing them from presenting any defense to the Commission's administrative prosecution or even having their substantive claims considered), the judgment would obviously have to be set aside and this case would be at issue again.

In support of its claim of adequate and independent grounds, the Commission makes no effort to explicate the law of this Court. After the fleeting introductory reference to *Coleman*, the Commission simply begs the question, and argues its version of California law. The reason for this diversion is clear; any attempt at coherent analysis of Federal "adequate and independent grounds" law would expose the fatal flaw in its position. Thus the Commission assumes, rather than proves, the linchpin of its argument.

The Commission attempts to buttress its position by urging, at Opp. p. 9, that Petitioners "never raised a constitutional attack" below. However, at Opp. p. 8, it quotes the Opinion below that the "heart of both . . . [the] petition and complaint are attacks on the Declarations of Restrictions on various *constitutional* and statutory grounds" (emphasis added), and at Opp. p. 16, states that "[i]n applying California's statutory law of assignment, the state court explicitly rejected Petitioners' attempts to bootstrap a Fifth Amendment claim to the purely state law issue."[2] The Commission seems in a bit of a quandary

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[2] At Opp. 9 n.3, the Commission correctly notes that the Petition identifies (solely to point out a strong probability of prevailing on the merits) seven state law issues, and that these were asserted below. But the Commission's suggestion that the resolution of the controversy below "is underscored" by the mention of these arguments is, with respect, disingenuous; *the*

as to what its position on this issue should be, and attempts to resolve it by arguing out of both sides of its mouth. In fact, the Commission is correct on pages 8 and 16, and incorrect on page 9. For example, the constitutional issues here presented were raised at pp. 3, 15, 21-15 of the petition for review to the California Supreme Court, which in itself is sufficient under the standard this Court prescribed in *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

III

THE COMMISSION'S RESPONSE TO PETITIONERS' AUTHORITIES AND ARGUMENTS (WHEN IT CHOOSES TO RESPOND) PRESENTS NO COMPELLING GROUNDS FOR DENYING CERTIORARI

The Commission consumes several pages of its Opposition with *ipse dixit* argument disputing the applicability of *Shelley v. Kraemer* to this case. (Opp. pp. 19-22) But the "distinctions" it makes are irrelevant to the point Petitioners argue. In *Shelley v. Kraemer*, this Court reached back to strike down 34 year old covenants because they were void *ab initio* (there because of restrictive covenants based on race). Similarly, in the case at bench, this Court is asked to reach back to 10 or 12 year old covenants, because they were void *ab initio* (for the reasons set forth at Petition p. 19-22). The point is that the passage of some

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preclusion bar was interposed and these issues went largely unconsidered. Petitioners were thus denied any opportunity to defend themselves against the Commission's charges.

kind of limitations period that might bar a facial challenge does not preclude a subsequent "as applied" challenge when a case or controversy ripens.[3]

Ignoring such concerns, the courts below held that Petitioners were obligated to bring an action – *an action challenging the right of parties who are strangers to this controversy to develop unrelated land* – when there was no reason to bring suit, and indeed when there was no right in anyone to bring an action for anything because there was no justiciable controversy. Indeed, at that time Petitioners had no interest in the lots, and the restrictions were not applied to them. But as this Court made clear in *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), an abstract facial challenge mounted after an objectionable regulation is first enacted, is unripe until an actual controversy over the regulation's application is presented. Thus, the Commission would have it that Petitioners' challenge can only be premature under *Pennell* or tardy under the opinion below – *but never timely*. Thus it goes in California.[4]

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[3] This is the same point made in the factually indistinguishable case of *Orange & Rockland Utilities, Inc. v. Philwold Estates, Inc.*, 52 N.Y.2d 253, 259-61 (1981), explicated at Pet. pp. 17-18. The Commission ignored this case, venturing no opinion as to why the constitutional rights of Californians should be more constricted than those of New Yorkers.

[4] This illustrates the validity of a comment by a distinguished jurist that property owners in California are entitled to something better than "thinly disguised contempt" from the judiciary in land use cases. *Tahoe-Sierra Preservation Council, Inc. v. TRPA*, 911 F.2d 1331, 1346-47 (9th Cir. 1991) (Kozinski, J., dissenting), *cert. denied*, 499 U.S. 943 (1991).

One of the central factual issues in the underlying case is whether the lots were even legally merged. Petitioners demonstrated at Pet. pp. 19-22 that under California law they were not, and that no one treated them as merged. The Commission's response is simply to state categorically, with no address of particulars, that "the 77 former individual lots were recombined into two larger lots." Opp. p. 5. No mention is made of the fact that the County and other entities continued to treat them as individual lots for taxes and all other purposes. (The Commission's treatment of *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994), like its treatment of *Shelley v. Kraemer*, raises "distinctions" that make no legal difference whatsoever.)

Similarly, the Commission slides by the fact that the sale of the lots with the restrictions (whatever they were) attached posed no threat of development. And yet it was this sale by Petitioners that stirred the Commission to its heavy handed intervention – even though identical sales of the individual lots by the County itself apparently did not bother the Commission at all. Compounding the injustice further is the fact that California Public Resources Code § 30810, which the Commission identifies as the section that "delineated" its "permanent cease and desist power" (Opp. p. 7), did not become effective until January 1, 1992 – *after* the acquisition of the lots by Petitioners, and most of the challenged sales.

The Commission's defense of the draconian limitations period characteristic of California law (at Opp. pp.

10-13) is interesting, but largely beside the point.[5] The question presented here is not the wisdom of such periods. It is rather, can they be triggered retroactively without thereby violating Petitioners' due process rights.

IV

CONCLUSION

The Commission defends against a charge that California law violates the Constitution of the United States by relying, almost to the exclusion of all else, on . . . California law. It implicitly passes over as of no consequence the astonishing affronts to equity and logic reflected in this record. Like the courts below, it takes the position that Petitioners were required to do what this court in *Pennell* clearly said they could not do: pursue an action before it ripens or even becomes a case or controversy.

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[5] *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), on which the Commission extensively relies, is the subject of a pending petition for certiorari in this court (No. 94-1124). And *Rossco Holdings, Inc. v. State of California*, 212 Cal. App. 3d 642 (1989), on which the Commission not only relies but chides Petitioners for not mentioning, is clearly inconsistent with the language of *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 306-37 (1987), directed to California courts, which flatly and explicitly rejected the underlying premise of *Rossco* that an aggrieved Californian must wait to recover compensation until it is first "finally determined" in a writ proceeding that the challenged regulation constitutes a taking of property. Once again, California goes it own way.

The Commission's ultimate argument is that Petitioners' rights were destroyed before they were acquired.

Certiorari is respectfully urged.

Dated: January 12, 1995

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